



**NORTH DAKOTA
DEPARTMENT OF HEALTH**

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OFFICE OF
STATE HEALTH OFFICER
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August 2006

Dear School Administrators:

Since the fall of 2004, one dose of chickenpox vaccine has been required for children entering school. For the school year 2006/2007, one dose of chickenpox vaccine is required for children in kindergarten through second grade. In previous communications we informed you of a change to the recommendations for chickenpox vaccine. In June 2006, the Academy on Immunization Practices (ACIP) and the Centers for Disease Control and Prevention (CDC) changed the recommendation from one dose of chickenpox vaccine to two doses for all children without evidence of chickenpox disease.

The North Dakota Department of Health contacted the Attorney General's office for an opinion of the current administrative rules regarding vaccination requirements for school age children. At this time, it is the opinion of the Attorney General's office that the current rules cannot be applied to new recommendations that are made after the rules went into effect. This means that children will not be required to have a second dose of chickenpox vaccine until there is an administrative rule change.

The North Dakota Department of Health will continue to work with healthcare providers and local health departments on this issue. We will inform the schools when the rules have been changed and what will need to be done to catch up the children needing a second chickenpox vaccination.

If you have any questions, please contact the North Dakota Department of Health Immunization Program at 701-328-3386 or 800-472-2180.

Sincerely,

A handwritten signature in black ink, appearing to read "Terry L. Dwelle".

Terry L. Dwelle, MD, MPHTM
State Health Officer

TLD:lrr



Wayne Stenehjem
ATTORNEY GENERAL

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MEMORANDUM

TO: Kirby Kruger, Director, Division of Disease Control

FROM: Edward E. Erickson, Assistant Attorney General

RE: School Immunizations Against Varicella (chicken pox)

DATE: August 31, 2006

The Federal Advisory Committee on Immunization Practices has recently recommended that children should be given two doses of varicella (chicken pox) vaccine instead of one, as previously recommended. You asked whether a second dose of varicella vaccine is a legal requirement for children to enter school. It is my opinion that a second varicella vaccination is not required before a child may enter school because the new recommendation from the Advisory Committee has not been adopted into North Dakota law by rule. Therefore, a school should admit a child who has received one varicella vaccination.

State law provides that a child must be immunized against varicella and certain other diseases before the child may be admitted to school or certain other programs.¹ The State Department of Health is required to adopt rules specifying the necessary immunizations.² The Department's rule incorporates a reference to age-appropriate immunizations recommended by the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services.³ The most recent version of this rule was adopted January 1, 2004.⁴

In June 2006, the Federal Advisory Committee recommended that varicella vaccine should be administered twice, the primary dose being given between 12-15 months old and a second dose to be given between 4-6 years.⁵ The Department's rule generally

¹ N.D.C.C. § 23-07-17.1(1).

² N.D.C.C. § 23-07-17.1(5).

³ N.D.A.C. § 33-06-05-01(1)(a).

⁴ See History section following N.D.A.C. § 33-06-05-01.

⁵ Advisory Committee on Immunization Practices, Vaccines to Prevent Measles, Mumps, Rubella, and Varicella (Resolution No. 6\06-3, adopted June 29, 2006), accessed at www.cdc.gov/nit/vfc/acip_resolutions\0606mmrv.pdf on August 22, 2006.

Kirby Kruger
August 31, 2006
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adopts the Advisory Committee's recommendations, and also requires that a student receive the varicella vaccine before being admitted to kindergarten or first grade. When this rule was adopted, the Advisory Committee was not recommending two varicella vaccine doses. At question is whether the administrative rule automatically adopts new recommendations from the Advisory Committee.

This question is very similar to the question answered by the North Dakota Supreme Court in McCabe v. North Dakota Workers Compensation Bureau.⁶ McCabe was an injured employee seeking benefits for permanent impairment. A state law had adopted the "most recent edition" of the American Medical Association's Guides to the Evaluation of Permanent Impairment. This language was enacted in 1989, and had not been amended or reenacted before McCabe's evaluation in 1994.⁷ The Workers Compensation Bureau applied the fourth edition of the Guides as the most recent edition in existence at the time McCabe was evaluated.⁸ McCabe argued that the statute may only incorporate the most recent edition of the guides in existence when it was enacted, which would have been the third edition.⁹ The Supreme Court determined that a statute may not incorporate future changes to an existing document¹⁰ because that would unconstitutionally delegate legislative power to whoever was publishing the document.¹¹ The North Dakota Supreme Court therefore construed the statute to adopt the most recent edition of the AMA Guides that was in existence at the time the statute was enacted, which was the third edition.¹²

It is my opinion that the McCabe decision would apply equally to the Department's adoption of the recommendations by the Advisory Committee on Immunization Practices. Specifically, this rule was most recently amended on January 1, 2004, and cannot be held to incorporate any changes to these recommendations that were made after that date. If the Department wishes to adopt amendments to the Advisory Committee's recommendations that occurred after that date, the Department should do so through a new administrative rule making procedure.

vkk

⁶ 1997 ND 145, 567 N.W.2d 201.

⁷ Id. at ¶ 6.

⁸ Id. at ¶ 9.

⁹ Id. McCabe would receive benefits under the third edition, but he would not receive benefits under the fourth edition.

¹⁰ The Court included statutes, codes, regulations, and standards, as well as guidelines.

¹¹ Id. at ¶¶ 13, 16.

¹² Id. at ¶ 16.